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In the Supreme Court of the United States

OCTOBER TERM, 1927

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner,

v.

THE NORTHERN TRUST COMPANY, AS EXECUTOR under the last will and testament of A. C. Bartlett, deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General on behalf of Mabel G. Reinecke, Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on December 12, 1927, affirming the judgment of the United Stites District Court for the Northern District of Illinois.

QUESTION PRESENTED

Were certain trusts created by Adolphus C. Bartlett in his lifetime properly included in his

gross estate for Federal estate tax purposes under the provisions of Section 402 (c) of the Revenue Act of 1921?

The court below held that as to some of the trusts there was no intent on the part of Congress to include them in the gross estate, and as to others that although Congress did intend to include them it had no power under the Constitution to do so.

STATUTES INVOLVED

The Revenue Act of 1921 (c. 136, 42 Stat. 227, 277, 278), provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States * * *. [Here follow the rates.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether

> such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

STATEMENT

The facts of this case are disclosed by the declaration (R. 4–76), and are as follows:

Adolphus C. Bartlett died May 30, 1922. (R. 4.) Prior to his death he created seven trusts. One of these trusts, known for the purpose of identification as Trust No. 4477 (R. 6), was created on March 1, 1919, and was not modified during the testator's lifetime. This trust provided (R. 7) that the trustees should collect the income from certain property transferred to them and out of the income pay to the settlor's wife $2,000 per month during the joint lives of the settlor and the wife (R. 9). The balance of the income during this period was to be accumulated. After the death of the settlor the wife is to be paid $2,000 per month during her lifetime or until she shall become entitled to a share in the decedent's estate, and the balance of the income is to be paid equally to the four children of the settlor or to the issue of such children as

may die. (R. 9, 10.) The trust is to terminate five years after the donor's death or at the death of the wife, whichever shall last occur. (R. 10.) At the time the trust terminates the corpus is to be distributed to the settlor's children or to the then surviving issue of such children, or in default of such issue and children, to the surviving issue of the settlor. (R. 10.)

The settlor reserved the right (1) to supervise the reinvestment of the trust funds (R. 7, 8); (2) to require the trustees to execute such proxies for voting stocks transferred as he may wish (R. 8); (3) to control all leases made (R. 9); (4) jointly with the majority of the beneficiaries to alter, change, or modify the terms of the trust (R. 12); and (5) to appoint a successor trustee in the case of resignation or incapacity of the trustee (R. 11). The trust provides that the beneficiaries shall have no power to "anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law." (R. 12.)

Trust No. 4478 (R. 26) is identical with Trusts Nos. 4479 (R. 35), 4480 (R. 45), and 4481 (R. 55), except as to the beneficiaries. These four trusts were created on March 1, 1919, and were amended in certain particulars on June 28, 1921. (R. 32, 42, 52, 61.) As created they provide that the trustees shall receive and collect the income (R. 27, 37, 46, 56) and shall accumulate the same during the life of the donor except so much thereof as the donor

directs to be paid to the beneficiary or his issue, and after the death of the settlor the income shall be paid to the beneficiary for life or until the termination of the trust (R. 29, 39, 48, 58). The trust terminates five years after the settlor's death or at the death of the survivor of the beneficiary and settlor. (R. 29, 39, 49, 59.) At the time of the termination of the trust the corpus is to be distributed to the beneficiary or to his appointees under his last will and testament, or if no such appointees then to the surviving issue of the beneficiary, or in default of such surviving issue then to the surviving issue of the settlor. (R. 29, 39, 49, 59.) The same powers were retained by the donor as were retained in Trust deed No. 4477, except that the right to modify was exercisable only in conjunction with the single beneficiary. (R. 31, 41, 51, 61.) The same provision as to the anticipation by the beneficiary was made. (R. 31, 41, 51, 61.) These trusts were modified on June 28, 1921, so that thereafter the income, instead of being accumulated, was payable to the beneficiary or to the guardian of the issue of the beneficiary in such amounts as such beneficiary or guardian might ask for during the term of the trust. (R. 32, 42, 52, 61.)

Trust No. 1831 (R. 65) was created on February 11, 1903, and provided that the income from the trust fund should be paid to the settlor for life, and after the death of the settlor to the daughter, Florence D. Bartlett, until the termination of the trust. One-half of the corpus was to be paid to

the daughter when she reached the age of thirty years, the remainder to be paid to the daughter when she reached the age of thirty-five years (but in no case before the settlor's death). (R. 65.) If the daughter should die before receiving all the corpus, then the corpus, undistributed, was to be paid to the appointees of the daughter named by her last will and testament, in default of such appointee then to her heirs at law. (R. 65, 66.) *The settlor reserved the right to revoke this trust in whole or in part.* (R. 66.)

Trust No. 3048 (R. 68) was created on the 30th day of December, 1910, and in its terms is identical with Trust No. 1831, except that the beneficiary is another daughter and the distribution is to be made when such daughter reaches the age of fifty years. It is also provided that the trustee shall exercise his discretion in the amount of the income to be paid to the daughter during the term of the trust. (R. 69.)

From the foregoing it appears: That Trust No. 4477 provided that any of its provisions could be "altered, changed, or modified in any respect and to any extent" at any time during the life of the settlor by the delivery to the trustee of an instrument in writing signed by the settlor and a majority of the five beneficiaries. (R. 12.)

That Trusts Nos. 4478, 4479, 4480, 4481 each provided that any of its provisions could be "altered, changed, or modified in any respect and to any extent" at any time by an instrument in writing

signed by the settlor and the single beneficiary. (R. 31, 41, 51, 61.)

It also appears: That in Trust No. 1831 the settlor reserved "the right to have said stock, or its equivalent, or any part or portion thereof retransferred to me, and to cancel the trust hereby created relative thereto, either in whole or in part, and to possess and enjoy said stock and its equivalent, or any part or portion thereof, as though this trust had not been created." (R. 66.)

That in Trust No. 3048 the settlor reserved "the right of revoking this instrument and each and every trust hereby created, either in whole or in part, by notice in writing to the Trustee, and in case of such revocation said trust or the portion thereof as to which this indenture may be revoked shall be conveyed by said Trustee to said Adolphus C. Bartlett, to be held by him freed from all trusts herein contained." (R. 69.)

The value of the property transferred to the trustees of Trusts Nos. 4477, 4478, 4479, 4480, and 4481 was included in the value of the decedent's gross estate by the Commissioner of Internal Revenue under the provisions of the Revenue Act of 1921 (R. 13, 34, 44, 54, 64), on the theory that the trusts and transfers were intended to take effect in possession or enjoyment at or after the decedent's death. The respondent paid under protest and duress the tax assessed by reason of this inclusion (R. 19, 35, 44, 54), duly filed a claim for refund (R. 19, 35, 44, 54), which was rejected by the Com-

missioner (R. 22, 35, 44, 54), and brought this action to recover this tax.

In filing the estate tax return under the provisions of the Revenue Act of 1921 the value of the property transferred to the trustees of Trusts Nos. 1831 and 3048 was included by respondent in the value of the gross estate, and the tax thereon was paid under compulsion and in fear of the penalties provided in said statute. (R. 66-67, 70.) The claim for refund previously referred to included the tax computed upon these two trusts.

Demurrers to the declaration were filed by the defendant (R. 77, 82), which the court overruled (R. 81, 84), whereupon, the defendant refusing to plead further, judgment was entered against her. (R. 84.) This judgment was affirmed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the trusts created in 1919 were not intended to take effect in possession or enjoyment at or after death, and further in holding that Congress had no power to include in the gross estate the property in the trusts created in 1903 and 1910, absolute power to revoke which had been reserved to the trustor.

REASONS FOR GRANTING THE WRIT

In the case of *Nichols* v. *Coolidge*, 274 U. S. 531, this Court held that Section 402(c) of the Revenue Act of 1918, which is identical with Section 402(c) of the Revenue Act of 1921, was unconstitutional

in so far as it attempted to include in a decedent's gross estate the value of property as to which the decedent had created, prior to September 8, 1916, an irrevocable trust on such terms that she retained no interest whatever in the property. In the case of *Shukert* v. *Allen*, 273 U. S. 545, this Court held that this section did not cover the case of a trust, under which the founder retained no interest in the trust property and under which the distribution of the corpus and termination of the trust were in no way related to the time of the founder's death. The question whether the retention of an interest in the trust property is necessary in order that the trust may come within the statute is, in view of the decision in the *Coolidge case*, doubtful.

The question whether revocability, when added to a postponement of enjoyment until after the founder's death, is sufficient to justify the inclusion of property subject to such a trust in the gross estate has not been passed upon by this Court. In two of the trusts the trustor reserved to himself absolute power to revoke them at any time. A further question arises in this case in connection with the trusts created in 1919. At the time these trusts were created there was an Act in effect making such transfers taxable. This Act, however, was amended and reenacted before the decedent died, so that there arises the question whether or not the power of Congress extends to the taxation of such trusts when they are created after the passage of the taxing Act, and if so whether the repeal and

reenactment of that Act operates to relieve the transfer from taxation.

These questions are of constant occurrence in the application of the estate tax law, and have given rise to much litigation which is now pending in various courts. They are of such a nature that the Circuit Court of Appeals in this case felt justified in saying "more discussion will not help to solve the riddle."

In order that the Bureau of Internal Revenue may have a rule for its guidance on a question touching the power of Congress to impose a tax, it is desirable that this Court review this case.

Similar cases are now pending in the Circuit Courts of Appeals for the Second Circuit (*Farmers' Loan & Trust Company* v. *Bowers*, 15 F. (2d) 706; the Third Circuit (*Fidelity Trust Company* v. *McCaughn*, 17 F. (2d) 605, and in the Sixth Circuit (*Stark* v. *United States*, 14 F. (2d) 616). These cases have not been decided and in all probability will not be decided until after the time within which an application for certiorari in this case can be made, so that it is impossible to await the result of those decisions to determine whether or not there will be a conflict.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MARCH, 1928.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1927. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

After the decisions of this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, the Bureau of Internal Revenue modified its regulations so as to conform to those decisions. There were, however, certain cases not similar on the facts to those cases, and apparently not covered by the principles announced therein. The regulations, which are set out as an appendix to this brief, now provide for the inclu-

sion of trusts where the enjoyment of the remaindermen is expressly deferred until the founder's death and the trusts are either revocable and therefore not completed transactions until after the Act was passed, or else were taxable under a prior or existing Act in force at the time they were created.

The trust instruments involved in this case are of such a nature and were made at such times that they fall within the new regulations, and the case raises three questions which have not been decided by this Court. These questions are:

1. Whether the trusts were intended to take effect in possession or enjoyment within the meaning of Section 402 (c) of the Revenue Act of 1921;

2. If so, has Congress power to include in a decedent's gross estate the value of property with respect to which he has created a trust intended to take effect in possession or enjoyment at or after his death where the trust was revocable by the trustor and was created prior to the passage of the first Federal estate tax Act, to wit: September 8, 1916? This question arises in respect of Trusts Nos. 1831 and 3048. (R. 65, 68.)

3. Can Congress include in a decedent's gross estate the value of property with respect to which he has created a trust intended to take effect in possession or enjoyment at or after his death where the trust was created after September 8, 1916, but before the passage of the Act in effect at the time the decedent died and where it can be altered, changed or modified in any respect and to any ex-

tent by the founder acting jointly with a majority of the beneficiaries, or jointly with the single beneficiary in those trusts where there is only one? This question arises in respect of Trusts Nos. 4477, 4478, 4479, 4480, and 4481. (R. 6, 26, 35, 45, 55.)

The trusts created March 1, 1919, are all similar in that under none of them was the income payable to the settlor, but in all of them the corpus was to be distributed after the settlor's death. In this respect the trusts are like that involved in the case of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case had the trust not been within the statutory language it would not have been necessary to have passed upon the constitutional question. Since the majority of the Court found it necessary to pass upon the constitutional question, it is arguable that the majority of this Court was of the opinion that such a trust was within the Act. This inference is strengthened by the recent decision in the case of *Saltonstall* v. *Saltonstall*, No. 144, October Term, 1927, decided February 20, 1928, not yet reported.

The remaining trusts are clearly within the language and spirit of the Act, since they provide for the payment of the income to the settlor for his life with power to revoke these trusts at any time.

McCaughn v. *Girard Trust Company*, 11 F. (2d) 520;

Farmers' Loan & Trust Company v. *Bowers*, 15 F. (2d) 706.

In the *Coolidge Case* the Court said (p. 543) that Congress had no power to include a trust "merely

because the conveyance was intended to take effect in possession or enjoyment at or after his (the founder's) death". Where, however, such a trust is revocable it is clear that the gift does not become final either as to the beneficiaries or as to the founder until he dies without revoking. *Saltonstall* v. *Saltonstall, supra.* The gift is, therefore, "ambulatory" and to all intents and purposes there is a "transfer" from the decedent to the beneficiaries at his death.

Farmers' Loan & Trust Company v. *Bowers, supra;*

Matter of Schmidlapp, 236 N. Y. 278.

Assuming that it is within the power of Congress to include transfers which are intended to take effect in possession or enjoyment at or after death when such transfers are made while an Act taxing such transfers is in effect, then with respect to the trusts made by this decedent in 1919, the question arises whether the repeal of such a taxing Act and its substantial reenactment by another Act so operates as to relieve from taxation those transfers which except for such repeal would have been taxed.

Bear Lake Irrigation Company v. *Garland,* 164 U. S. 1;

Lamb v. *Powder River Live Stock Company,* 132 Fed. 434;

Great Northern Railway Company v. *United States,* 155 Fed. 945;

Steamship Company v. *Joliffe,* 2 Wall. 450.

There is some power retained by the founder in each of the seven trusts here involved. In view of the decision in the *Saltonstall Case* it is quite plausible to say that the transfer is not complete until the power to revoke is destroyed by the death of the founder.

Whatever may be said about the other trusts, the reservation in two of an absolute power to the trustor to revoke at any time, presents a case which justifies consideration by this Court.

It is therefore respectfully submitted that the petition for certiorari should be granted.

WILLIAM D. MITCHELL,
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MARCH, 1928.

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APPENDIX

Reg. 63, Art. 19 (as amended by T. D. 4064, dated August 12, 1927):

> All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for a fair consideration in money or money's worth which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as part of the gross estate.
>
> Where a transfer (whether made before or after the passage of the Revenue Act of 1916) was intended to take effect in possession or enjoyment at or after the decedent's death, and the enjoyment of the property or the interest transferred was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, the value, as of the date of the decedent's death, of the property or interest so transferred must be returned as a part of the gross estate.